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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 455

AUTOMATIC RADIO MANUFACTURING COMPANY, INC.,

Petitioner,

against

HAZELTINE RESEARCH, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

ANSWER TO PETITIONER'S OBJECTION TO MOTION ON BEHALF OF EDWIN H. ARMSTRONG FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

ALFRED MCCORMACK,
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WALTON H. HAMILTON,
Of Counsel.

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We address ourselves to the four points stated in the petitioner's "Objection" to the filing of our brief.

1. That the motion is not independent of the brief.

The motion presented on behalf of Dr. Armstrong is a self-contained paper. It makes no reference to the brief which accompanies it and is independent of the brief. We have understood that it is customary, in asking this Court for leave to file a brief *amicus curiae*, to attach the brief to the motion in order that, in passing on the motion, the Court may refer to the brief, if it so desires, in order to determine more readily whether it should be received.

In this instance the time schedule would hardly have permitted any other procedure.

2. That the motion is not timely.

The significance of the case derives from the fact that the Solicitor General filed a memorandum in support of the petition for certiorari, and has now filed a brief *amicus curiae*, asking this Court, in making its decision on the concrete facts of the case, to announce several principles of general application to patent licenses which, if adopted by the Court, would substantially affect inventors and patent owners.

The Solicitor General's brief was filed in this Court on March 14. Armstrong's motion, with the accompanying brief, was filed on the following day, March 15. In order to file it on the 15th, three weeks in advance of the probable date of argument, it was necessary to address the motion and brief to the earlier memorandum of the Solicitor General, to write them upon the assumption that the Solicitor General's brief on the merits would be sufficiently similar to his memorandum so that our papers would be relevant; and then to examine the Solicitor General's brief before filing the papers, in order to determine whether that assumption had proved to be correct. It would not have been physically possible to ascertain that fact until March 15, the day after the brief of the Solicitor General had been filed.

Rule 27, paragraph 9(a), with its reference to the filing of an *amicus* brief "promptly after * * * granting certiorari", should not be held to render Dr. Armstrong's motion untimely. The case came to his notice late in January, at which time he was engaged in testifying in a deposition on

pre-trial proceedings in a patent suit, and in discovery and inspection of documents of the adverse party in that suit. After his deposition ended on February 10, he gave prompt attention to the problem of whether it would be appropriate for him and desirable for him to ask leave to file an *amicus* brief in this case. After a number of discussions with his attorneys, he gave instructions to them on February 23 to prepare the necessary papers, and the papers were then prepared as promptly as circumstances permitted, in view of the necessity of correspondence between counsel in New York and Washington.

Where, as here, an applicant for leave to file a brief *amicus curiae* has made his motion, attaching the brief, two days after the petitioner's brief has been filed and one day after filing of the brief to which he desires to address himself—in this case the brief of the Solicitor General—and well in advance of the date fixed for argument and the date when respondent's brief is due, it is submitted that any reasonable requirement of promptness has been met.

3. That the motion does not state the nature of Professor Armstrong's interest.

Professor Armstrong's interest in the issues before this Court, as framed by the Solicitor General, is stated succinctly in our motion, and is further shown under the next heading.

4. That the motion does not set forth any facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case.

Dr. Armstrong has been engaged for many years, and is still engaged, in fundamental research which is financed

from revenues derived from his patents. The licensing system under his FM patents is designed to produce fair royalties and to encourage and promote the widest public use of his inventions. His licensing policy is an open one, and he imposes no restriction upon any of his licensees beyond those which the law requires him to impose in order to make his licensing system effective.

He represents a class of patent owners different from that which respondent represents; and while both Dr. Armstrong and respondent are interested in the field of radio and have, no doubt, many problems that are common to patent licensors in such a field, there are sufficient differences between their respective situations to justify the presentation of their different viewpoints, in a case where the representatives of the Government have come before the Court to advocate the adoption of broad principles that would have a most serious and adverse effect on all patent owners.

In such a case an *amicus* brief of an individual patentee, if it served no other function, might assist the Court in appointing more precise bounds to its decision, and might serve also to put the facts of the particular case in their proper place in the scheme of things.

The case before the Court falls along the line where the patent grant, the anti-trust laws and public policy meet. The number of such cases—each with its own concrete situation—with which this Court has been confronted is surprisingly small. The public interest, which we join the Solicitor General in insisting is dominant, must in this domain be realized amid a conflict of values. There is not a single uniform system for the licensing of patents, but a host of systems differing widely in character, in the aims

which prompt them and in their incidence upon the public, upon the economy and upon individual interests. Those licensing systems are put to work in an organic and dynamic industrial society in the greatest variety of circumstances; and legal rules of thumb that might serve the interest of the public in one set of circumstances might have the opposite effect in other circumstances.

The Solicitor General, coming here as *amicus curiae* as of right, has asked the Court to employ this specific case for a wholesale reform of business practices in a field as important as patent licensing. We urge that it is appropriate and highly desirable for this Court to give consideration to the impact of the suggested rules on others than the particular parties, and especially on the individual inventor and patentee, whose protection and encouragement are within the immediate constitutional purpose of the patent law.

The reasons for permitting Dr. Armstrong's brief to be filed in this case are similar to, and no less strong than, the reasons which moved this Court in *Standard Oil Company* v. *Federal Trade Commission*, No. 107 in this Term, to grant leave to an attorney for a group of retailers and an attorney for a group of jobbers to present their opposing views in oral argument as *amici curiae*.

Respectfully submitted,

ALFRED MCCORMACK,
Attorney for Edwin H. Armstrong
as *Amicus Curiae*.

WALTON H. HAMILTON,
Of Counsel.

21 March 1950